APPENDIX A -TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DECEMBER 23, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK,
Plaintiff,

-against-

INSURANCE COMPANY OF NORTH AMERICA,
Defendant,

-against-

FEI, LTD., et al.,
Third Party Defendants.

85 Civ. 1238 (TPG)

New York, N.Y.
December 23, 1992
5 p.m.

Before:

HON. THOMAS P. GRIESA,
District Judge

APPEARANCES

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for plaintiff
BY: RICHARD C. SELTZER

DANIEL O'CALLAGHAN
Attorney for FEI

(In the robing room)

THE COURT: I am using this format, rather than dictating an opinion in my office, because you may have some points to make as I go along which address specifically what I am saying and were not included in the papers and correspondence that I have received. Also, I might have questions for you. Let me start.

It is my analysis that FEI is now presenting claims in the total net amount of $2,902,899. The components of this are as follows, according to my analysis:

Overhead, $900,000;

Taxes, $1 million;

Retentions, $1,059,150, broken down as follows: retentions on A and C, $735,213, and retentions on B and D and the Winter Garden, $323,937 -- for a total of $1,059,150;

Unpaid work on building B, $400,000.

If you add the 900,000, the 1 million, the $1,059,150, and the $400,000, you come to $3,359,150.

There is a loan outstanding, balance due from FEI to O & Y, of $456,251. The suggestion is that that should be paid out of the retentions, but anyway if you deduct that, according to what is proposed by FEI, you come to the figure of $2,902,899.

Now let me take up the items in order.

The overhead of $900,000. The claim of FEI is that, in connection with buildings A and C, there was an agreement to pay FEI $900,000 to cover FEI's overhead, and the claim is that that is something over and above what was found -- let me be more careful and more precise -- that was something that can be claimed now and asserted now for litigation and further trial, and that it is not taken care of or included in any amounts covered by the verdict.

What I have tried to do is to test that in several ways. There are two theories of FEI as to the nature of the agreement to pay the overhead.

It is said that that agreement was contained, or at least implied, in a letter of Mr. Blau dated April 21, 1984, and the claim is that there is a chart attached to that letter which speaks of a revised schedule of payments and there is some mention of overhead.

A second source of the alleged agreement to pay this separate amount of overhead is said to be some notes of an employee of 0 & Y by the name of Givitz [sic] [Griffiths], and there is also an affidavit of Mr. Fogarty. The theory is that, relying on the Givitz [sic] [Griffiths] notes and the Fogarty affidavit, that overhead is separated out from the contract price for A and C, and the overhead is to be paid as part of the price for buildings B and D, or in some other way different from payments on the contract for A and C.

In my opinion of September 19, 1988, and in the evidence, there is reference to an amount of $7,812,407. That represents -- and I don't think there is any contradiction about the figure -- the amount of expenses which O & Y incurred prior to termination over and above what I will call the formal adjusted contract price of $14,109,745. I am not going to go into explanations of these figures, and at the same time I don't expect that the lawyers should have all this committed to memory, but let's hope we are reasonably conversant with them, and I have a bunch of materials in front of me which I am relying on and I will help you out to the extent that you need it. But let me just try to go forward.

There was what I will call the formal adjusted contract price, the figure I just mentioned. Then the undisputed evidence is, to my memory and according to my records, that O & Y spent on A and C $7,812,407 above that formal adjusted contract price prior to the termination, which I think occurred in the spring of 1986. If you add the formal adjusted contract price now to the 7.8 million, you come up to about 22 million.

It was my analysis, in the September 19, 1988 opinion, that the jury must have found that the adjusted contract price was the sum of these two figures, equaling about 22 million, when they found that FEI had defaulted and they found what was the amount of money that O & Y reasonably incurred above the adjusted contract price. When they found the $600,000, it was my analysis that they had to be considering that the adjusted contract price for their purposes was what I will call the formal adjusted contract price, plus this 7.8 million.

It seemed to me an obvious first question about the $900,000 was, was it included in this $7,812,407? I really can't tell. I don't know. If it was included, then surely there is no

possible basis for some additional claim now for that $900,000. If it wasn't included, then maybe there is some reason to talk about an additional claim for this additional, extra, separate amount, so called. Things are a little vague as presented to me, and I don't think it is possible to literally tell.

But I want to come to something which is more important. What was being presented to the jury was evidence, speaking in a very basic way, about what it was that O & Y agreed to pay to FEI. I am not prepared to analyze all the summations and discuss with you exactly what components and analysis you all gave to that question. But question 3 submitted to the jury had, as one of its component elements, a finding of what the adjusted contract price was, and that meant not just what was on some single piece of paper but what did O & Y under all the facts, all the evidence, agree to pay? As I explained in my written opinion of September 1988, and as was evident to me from my view of the trial at the time, including questions that the jury asked at the last stage of their deliberations and evidence they wanted reread, they knew that question was presented to them, they analyzed that question, and they came out the way, at least from my analysis, they did. They found what was the adjusted contract price, and then they found that there was an expense of $600,000 over and above that.

Therefore, what was being presented to them was the issue of what O & Y agreed to pay. Whether anybody literally argued that $900,000 in overhead was included in that, I am not prepared to say. What I am sure of, subject to correction, is that it was never withdrawn from them as an issue. Again, I will stand corrected on that if you find me something in the record where Mr. O'Callaghan said: The $900,000 overhead claim is withdrawn from the jury in this action. I don't think there was ever such reservation. I would never have permitted it if there had been, I hope. You just don't try cases that way. There was the basic issue of what O & Y agreed to pay.

MR. SELTZER: The jury had to have a fixed target for question 3, which is what is the floor of the parties' agreement and then is there a damage above that.

THE COURT: That is the point I have been making. I agree with that, and that is the point I have been trying to make.

Let me just finish, and then I will hear you.

I am prepared to rule -- and this is the only way that is compatible with any sense of an orderly trial of that case -- that the parties had an opportunity to present all the evidence that they wished to present about every element that O & Y agreed to pay on buildings A and C. Nobody reserved the question of whether O & Y agreed to pay overhead, or reserved the question, which I will come to later, about whether O & Y agreed to pay some taxes. Nobody reserved that as being some special contractual agreement which was not to be included with what was presented to the jury, And I must say, if there had been a suggestion of that, it would have been something that would have been quite anomalous. We were having a hard-fought jury trial on these basic issues, and there would have been no sense in reserving some special part of the agreed price for some later determination for some unknown purpose. There would have been no purpose in it, and it would have been foolish. So, in my view, the parties tried the issue of what was the total agreement of O & Y as to what it would pay FEI on A and C.

The problem from O & Y's standpoint is that O & Y insisted that the amount of that agreement was what was in the 14.9 million contract price, and O & Y steadfastly insisted that that was all it agreed to. But the jury found that the amount was higher. Regardless of the precise components of what was argued about and what wasn't argued about, the issue was presented to the jury. Therefore, if FEI did not specifically mention the $900,000 as being part of that agreement, if they wanted to have that included they should have argued about it. They should have said that the adjusted contract price was 22 million plus 900,000. That was the time to do it. It is not the time to do it after the trial.

Let's suppose that somebody had said,, "Gee, overhead should be something included, $900,000 overhead, and that is over and above the formal contract price of 14-some million and this 7.8 million paid. It should be not just 22 million, it should be 22.9 million. Then the jury might well have found that there was no $600,000; that the agreed contract price swallowed up the whole. But that was the time to do it. So I am ruling that there is no separate issue on which FEI has a right to claim now in some separate proceeding.

I know Mr. O'Callaghan has some things to say, and I

don't want to prevent him, but I want to cover the tax reimbursement claim of a million dollars. Everything I have said about overhead applies to that. If there was to be some claim that O & Y agreed to reimburse taxes in the amount of a million dollars, and that was part of the ultimate agreed price paid by O & Y, the time to do it was at the trial. It seems to me that they had all the evidence and they had all the arguments -- when I say "they," the jury -- that anybody wanted to make, and the issue was before the jury: What did O & Y agree to pay? If somebody wanted to say, well, it wasn't just 22 million, it was 22 plus 900,000 or 22 plus $1,900,000, that is the time to argue it, not in some separate proceedings later.

I don't imagine Mr. Seltzer is going to object, but Mr. O'Callaghan may.

MR. O'CALLAGHAN: Thank you, your Honor. I am not going to take the time to cover this in this conference today. The trial, of course, was many years ago. My recollection is not verbatim. However, I do have a clear recollection that the trial was abbreviated, and FEI's claims were separated and segregated out by the Court for a later trial. My recollection is not just that the B and D portion of FEI's claims were severed, but that FEI's claims were severed.

THE COURT: What do you mean FEI's claims?

MR. O'CALLAGHAN: The trial, as I recall it, after two, perhaps three weeks, became focused solely, essentially, on the issue of stone and whether or not there was a failure and default in the performance of O & Y in stone supply and FEI's responsibility concerning that issue. That became a focal point for our case. To see the outcome of the jury's verdict, in retrospect, at whatever numbers the Judge was referring to, as all-inclusive of all of FEI's claims, whereas in reality the focal point of the case was the stone, I think is --

THE COURT: It doesn't really answer my point at all.

MR. O'CALLAGHAN: I am trying to answer your point. FEI, it is my recollection of the evidence and of the pleadings, did

not have its day in court about any of its claims. It was a defendant essentially on the issue of stone. I disagree with the Court's characterization of default.

THE COURT: Find me some reference to this. You see, it doesn't help to make certain general statements about day in court. You had plenty of day in court. We consumed a lot of time, and the parties chose what issues they wanted to present, they wanted to argue. But ultimately there were some questions that had to be answered.

Incidentally, you will see from the record and you will see reference in those two opinions that I issued -- September 19, 1988, and June 2, 1989 -- that I originally proposed a somewhat different format for the interrogatories to the jury. The parties asked to have something different than I proposed, and I went along with the parties. But these interrogatories presented some issues to the jury. What I have just said about the issue of the adjusted contract price was inescapable. Maybe we should have had more findings broken down instead of interrogatories, but nobody proposed it.

The point is that if the jury had been limited in its ability to deal with the adjusted contract price problem, if they had been limited to some formal definition, as, say, a particular writing which did recite the 14.1 million, and if they had not been able to use all the available evidence and deal with it in a general way, FEI would have been stuck for a liability of millions of dollars. This is why I have contended at some informal conferences that FEI came out of this extremely well, and you might recognize that.

The reason I am upholding that jury verdict is my belief that the jury was able to consider all the evidence, formal documents, oral commitments, and determine in an overall way everything that O & Y agreed to pay. If there had been some limitation on that -- and I am repeating myself, but this is extremely important -- if there had been a limitation in the definition of adjusted contract price, that limitation would have probably meant that your client was liable for about $8 million or more. But some things follow from that. One is that if they were able to look at all the evidence and look at the picture in what I will call a total way, then we have to, in all fairness, regard the jury verdict as involving an all-inclusive statement of what O & Y

agreed to pay.

If you want to start carving things out, what you are leading to is the possibility that you will get a new trial on everything, and you may get stuck ultimately with a multimillion-dollar verdict against FEI.

MR. O'CALLAGHAN: If I may explain, your Honor, I respectfully disagree with the premise that all was tried.

THE COURT: Show me in the record where you reserved the $900,000.

MR. O'CALLAGHAN: I have a recollection -- this is today, as we sit here, after many years -- that the jury, certainly counsel, but I recall as well the jury, was directed to limit the case essentially to the stone issue and only to the stone issue and to see the case through that perspective.

THE COURT: That has nothing to do with what the amount of the adjusted contract price is.

MR. O'CALLAGHAN: I think there was a further ruling precluding all evidence other than relating to the stone, which essentially diluted and vitiated any need or requirement or interest in FEI of presenting any further claims.

THE COURT: You are totally ignoring the component of question 3, which required a finding of adjusted contract price.

MR. SELTZER: That's right, and I remember summing up to the jury very explicitly on how I calculated adjusted contract price. There couldn't have been footnotes hanging out there that said this isn't the real adjusted contract price.

THE COURT: I don't remember and -- I will be very frank with you -- I have not gone over that trial record. It was up to you gentlemen to present what you needed to present, I have to say to you, Mr. O'Callaghan, I have gone to a great excess of work over these claims of yours, which have been consistently presented in a very vague, unsubstantiated manner. You should

have seen these issues. If you wanted to tell me that the $900,000 was carved out of that jury's consideration, show me the record reference. That is the issue. Any lawyer should know that. We had a jury trial. We had a determination. We had questions answered. What you are doing is saying that some particular points were reserved or carved out. Maybe they were. But after all this time, it is up to you, not to come in with a vague memory about the stone issue. I know about the stone issue, but you are not even addressing the issue. I think the time is past for submissions of this or that. It was up to you to present what was legally relevant to get this issue tried separately, and you haven't done it. I have waited and waited, and you have been asked to provide the specific groundwork of these claims. I have no basis, on the submissions that you have given me, to find that this was an issue reserved and carved out. And I don't believe it was.

I say the same thing about the claim for tax reimbursement, a million dollars.

MR. O'CALLAGHAN: I have the same objection.

THE COURT: You have the same objection. I make the same ruling.

Now I want to go on to the retentions. I discussed that in my opinion of September 19, 1988, at pages 14 and 15. Incidentally, no opinion seems to get out of my office without a mistake. On page 15 there is a reference once to a 1.6 million claim of retention, and then it is referred to as 1.5. I don't remember whether it was 1.6 or 1.5. I will just assume it is 1.6 anyway. We know what we are talking about.

I said, and I am referring to buildings A and C obviously, "Even if O & Y retained the 1.6 million at some point, O & Y has more than made up this deficiency by the $7.8 million payments it made to and on behalf of FEI, beginning in the fall of 1984" -- which have been described previously. So I believe that that ruling of mine is sound, I stick by it. That covers the claim for retention in the amount of $735,213 for A and C.

Now we come to the $323,937 for B and D, and Winter Garden.

MR. O'CALLAGHAN: Your Honor, if I might place

something in the record about the A and C position. It has always been my argument at least that any additional funds that Olympia & York advanced they did so for their own account, to their benefit, and they withheld the retention and withheld it and sued at that time.

THE COURT: All right. When we get to B and D and Winter Garden, we are departing from the jury's verdict.

MR. O'CALLAGHAN: Your Honor --

THE COURT: So I think that the reasoning that I have used about the previous items cannot apply to the $323,937 claimed retention for B and D and the Winter Garden.

There is the claim of unpaid work on building B of $400,000. Again, that is certainly not covered by the verdict.

MR. O'CALLAGHAN: Your Honor, if I may add a point to that. The analysis that you are looking at was done in preparation for a meeting that the principals had of FEI and O & Y and was not completed, up-to-date, until I did some preparation prior to August of this year, and the actual number, as I calculate this, is closer to 475,000 on the B tower claim. On building D, there is a claim for close to $800,000, which you don't have on the list, most of which --

THE COURT: What is that about?

MR. O'CALLAGHAN: -- most of which, it is my recollection as I sit here today, are in the pleading, in the amended third-party complaint, I have little handwritten notes to myself, in preparation for the trial which we anticipated in August: "Production overruns, unfilled containers, some shipping disruption, and extra handling." And this was documented in claim submissions by FEI to O & Y, but in preparation for the settlement discussions was not at that time raised. But it certainly was available for trial.

THE COURT: When did you present that to me?

MR. SELTZER: It has never been presented in this court.

THE COURT: You were supposed to come in with your final submission and document it and support it. I don't have anything about that. It is always possible that something slips up in my office, it has before and it will again, so I don't want to penalize anybody for something that goes wrong in my office. But we were not at the pleading stage. We were at the point of submitting matters which Mr. O'Callaghan was supposed to document and support, and that was what I was supposed to deal with. Have we got any $800,000 --

MR. SELTZER: That's right, and we got, in 1988, this affidavit or affirmation from Mr. O'Callaghan and this affidavit from Mr. Fogarty. If those numbers are numbers he is coming up with this summer in 1992, that is four years later.

MR. O'CALLAGHAN: The numbers were in the pleadings.

MR. SELTZER: But this was submitted to the Court when the Court said, where is your detail, where is the support? And if it wasn't submitted in these pages in 1988 when the Court was asking for it, I don't think it is appropriate to keep rummaging through papers and coming up with new numbers today.

THE COURT: We had a hearing on the record on October 5, 1988.

MR. SELTZER: That's right, that is when you had asked --

THE COURT: And I made some requests. Then I got an affidavit of Mr. Fogarty, which I have analyzed as thoroughly as I possibly can, and had exhibits, and it was notarized on the 30th of November, 1988. Then I got -- I guess this is dated before that -- I got something from Kaye, Scholer dated --

MR. SELTZER: November 16.

THE COURT: -- November 16, 1988. And then I got an affirmation of Mr. O'Callaghan, November 4, 1988. That is it.

The thing has been sitting here for a little over four years, for a lot of reasons. One is, I was hoping that there would be a settlement. I was hoping and I thought that there was some discussion. Then I finally put it down for trial, and then we had a conference, and your colleague came in and reminded me that I had some homework to do. So this is where we stand. A lot of time has gone by. But the time does not create the opportunity for further amendment to those submissions. I am going to take those submissions of the fall of 1988 as fixing the claims, because there has been a lot of work done in my office, by my staff and by me, to try to take what I think have been rather difficult issues and determine what to do with them.

So my list is the list which I regard as the claims, and I have dealt with them. The two matters which I don't think were covered by the verdict are the retention claim of $323,937 relating to B and D and the Winter Garden, and the unpaid work on B, the claim for the unpaid work on B, $400,000. The $400,000 was a rounding. I think that Mr. O'Callaghan at times did the rounding himself. But if it is 400 plus, I am not going to worry about that. I am going to use the 400 for my calculations now, with the recognition that it is a rounding.

The total amount, not covered by the verdict, is $723,937. The verdict against FEI is $600,000. The unpaid loan owed by FEI to O & Y is $456,251. The total of those amounts is $1,056,251. We have mutual accounts. We have an amount owing from FEI to O & Y of $1,056,251. We have claims by FEI against O & Y, which I have held are not covered by the verdict, of $723,937.

If we should assume that FEI wins every penny of the $723,937, this would still leave a balance in O & Y's favor of $332,314.

I am not talking about interest, and let's not try to get into that.

Where do we go from there? Because it seems to me that we have a lot narrower issues in terms of money at this moment than maybe appeared, at least to FEI, before I entered into this discussion.

Obviously, FEI has the right to object, and FEI has stated

its objections on the record, but that is where this Court is. I would like to know where we go.

MR. O'CALLAGHAN: If I might respond, your Honor, on the building B claims, there is certainly my recollection of the pleadings -- I don't have a firm recollection today of the submission of October 5, '88 -- but certainly $800,000 of claims cannot --

THE COURT: Mr. O'Callaghan, right or wrong, I am fixing the claims of what you submitted to me in November and that's it.

MR. O'CALLAGHAN: I am not saying submitting. I have a recollection that --

THE COURT: I am saying that I am going by the submissions of the fall of 1988 as being what were submitted to me as the claims still to be dealt with. If I have misread the submissions of the fall of 1988, that is something else again, but I don't think I have. And the whole purpose of the exercise at that time was to define the remaining claims. I will treat it that way. What you claimed at that time is what remember. What remained and everything else was abandoned as far as I am concerned.

What I have done here today is to deal with what was submitted to me, according to my analysis, following the October 5, 1988 hearing, and I hope I have analyzed things correctly. If $800,000 was presented in those materials and somehow I have ignored it, I will be glad to have my attention called to that mistake. But I am not going to go back to prior materials.

We did have a trial, and I know that to some extent I asked to have certain things reserved, but out of desperation to get the trial over with, which deserved to get over with.

I wish there can be a little realism on the part of FEI -- and I return to something I have said many times -- and that is that it was within the jury's province to send you out of that trial with a verdict against FEI of many millions of dollars, 10 million, 12 million, or more. They took a view of the evidence which I am not sure even you argued very much, because, as you have said just now, you were concentrating on the stone issue.

MR. O'CALLAGHAN: I said that the Court directed --

THE COURT: You thought that if you could beat O & Y on the stone issue and show that they were at fault, you could beat the case. It turned out that wasn't the only issue, and you did an extremely good job at that trial, I am not saying you didn't, but the point is the jury took the issues and fashioned them in a way that I believe was entirely fair but it really made more of some of your arguments than you almost made. If somehow you and your client could gain some small recognition of how extremely well you emerged from that trial, it might make settlement of this matter possible.

I will not have any trial, except possibly on the matter of the retention for B, D, and Winter Garden, and unpaid work on B. I will say it on the record: I think it is a shame to consume the time of the Court and the time of O & Y and have all this litigation expense on that. I think the action should be over with. But I don't see my way to ruling as a matter of law on a summary judgment in throwing out these remaining claims which I have talked about.

What do you say? Do you have any other words of wisdom about what I have said was not covered by the verdict?

MR. SELTZER: I think there was a strong argument that O & Y had a right to terminate FEI's services on B and D contracts and that our right to terminate was vindicated by the jury's finding that FEI had defaulted in its performance on A and C. For the same reasons that they were in default on A and C, we could not have been required in law to continue using a defaulting contractor to proceed with two more buildings. FEI's financial incapacity to perform the first two contracts disabled it from performing B and D.

THE COURT: I know that argument and maybe I haven't grasped it fully. FEI did some work on B and D, right?

MR. SELTZER: Yes.

THE COURT: And O & Y terminated them, right?

MR. SELTZER: Terminated for cause.

THE COURT: I think you are right on the legitimacy of terminating them. What I am not clear on is who owes whom what after the termination? Maybe I have not given full effect to your rights on that, because I think you had a right to terminate, and I would say that it would be ridiculous to have another trial to see if there was a default because of a financial problem. You were in court, O & Y was in court, FEI was in court, and I think the jury's finding of default -- that was the answer to my question -- is the finding that controls. But my question is, who owes what after that?

MR. SELTZER: In responding to that, the Court has told us that there can't be a quantum meruit claim where the parties entered into a transaction based on a written contract. You have even reminded us of the law in New York, which is quite strong in saying that. Therefore, if FEI is in material breach of the B and D contracts, their material breach is going to cut off their right to enforce future obligations to pay under the written contract. If they don't have a right to further compensation under the written contract because of their prior material breach, they are not going to be able to then turn to quantum meruit and say, well, O & Y was enriched by the value of our services.

THE COURT: According to the contract, what was their right? There was no right to be compensated for what they had done?

MR. SELTZER: For the value of goods that were turned over to us. If they had left materials on the site which we then inherited and gave to another contractor, they would be entitled to get credit for that. But their claim is that they turned over stones that we then used with someone else.

THE COURT: The claim is for work, it is for labor, basically.

MR. SELTZER: And the labor was defectively performed, and bringing somebody else in cost us much more than

the B and D contract with FEI.

THE COURT: Let's suppose that their claim to $400,000 is not for stone supply, it's for their own labor, their materials, their tools, and so forth. Let's suppose they had a claim up to that point to which, if they had continued, they would recover. I am frankly a little hazy on this, but my point is, let's suppose just hypothetically they would have a contractual right to get paid $400,000 to that point if all had gone well. Now, all didn't go well. They were financially in trouble and defaulted because of that reason, and they were terminated. But under my hypothetical, which is a little bit artificial, did they have no contractual right to get paid?

MR. SELTZER: I think they were paid whatever they were due under the contract up to the point of termination, and the reason we terminated was to cut off all further contract rights. That is why Mr. O'Callaghan has characterized his claim for unpaid work as a quantum meruit claim in the papers that he submitted in the fall of '88. He then tried to augment that amount by adding a retention, which your Honor summarized also as the $323,000. That is a different category altogether. Retention isn't for --

THE COURT: What is your $400,000 claim?

MR. O'CALLAGHAN: Your Honor, my recollection is, they weren't paid anything for their work.

THE COURT: On B?

MR. O'CALLAGHAN: On building B tower. That is what the claim is: that they did engineering design, drafting, the stone analysis, and the layout, up to the 26th floor.

THE COURT: Could we do this. It is 6 o'clock. I don't want to go over anything on which I have ruled, but I would appreciate your taking a little more time and analyzing the two items I am talking about, because I don't want to roll into a trial if it is unnecessary. I am simply not certain, and maybe I should

be, that your papers are all that clear about this. I do not want additional papers. If Mr. O'Callaghan's presentation is too vague to make a claim, it is too vague to make a claim. But I would like another brief session if you could come down, and we could simply take these remaining issues and decide do we have to have a trial or don't we. I was impressed with the O & Y's contractual claims but I wasn't certain of it. In other words, your point is, there was a breach of contract, and you under the contract owed no more money on B, D, or the Winter Garden. I just couldn't quite come to that point on what was presented to me, but maybe I am just missing something.

MR. SELTZER: I will have to see if he is making a claim for more than quantum meruit. I understood that the claim for unpaid work was quantum meruit, and if that is what it is, maybe the Court has already spoken to that.

THE COURT: I am not interested in quantum meruit. I am talking about whether there is any right under the contract. Maybe it is my fault but I am just not clear about that.

MR. SELTZER: I will check what we submitted in November and see if there is a claim going beyond quantum meruit, a claim to enforce the contract to pay him the 400, 000.

THE COURT: I think it is worth it to do that, because if we fall into another trial on this and end up realizing that there wasn't any need for that trial if we had just analyzed the contract and the facts better, then why go through that? I think it is worth that extra step. Everything else that I have said I am regarding as final.

MR. SELTZER: The second point, which I said I thought was probably the more important point, is that it would be instructive to me and to O & Y to find out something about the financial condition of the FEI entity, which is a party to this case. Our interest in pursuing this further is going to be enhanced or limited by FEI's ability to pay. We will want what the financial condition of the company is. We don't have a bonding company anymore.

THE COURT: What you are saying is that if my rulings stand, O & Y is the party that is owed money.

MR. SELTZER: Right.

THE COURT: Even if they get all the 700-odd thousand. I think you have to pursue that with Mr. O'Callaghan. Maybe you will get cooperation, maybe you won't, I don't know. What do you suggest? Do you want any relief from me?

MR. SELTZER: I wanted your support for our getting limited discovery. By "limited," I mean I am not going to ask for volumes; I would like to see financial statements that have been prepared by accountants or financial statements that have been submitted to banks or which have been submitted to other builders to support FEI's applications for loans or FEI's applications to get contracts for new work, so we can see what they are telling the world is their net worth.

THE COURT: What about that?

MR. O'CALLAGHAN: I don't think it is appropriate at this time, your Honor. I think Olympia & York is the party that we should be concerned about.

Secondly --

THE COURT: When all is said and done, while I think it is just great to be a real tough lawyer, there are times that you are not going to serve your client very well. The party who came out of that trial really badly was O & Y. You came up swimmingly. Let's just talk about the possibility of an appeal after a final judgment. You can't do anything on appeal, nothing. I think that if anybody has any real grounds for appeal, anything to talk about, it is O & Y. And I don't think O & Y would win. I think that things were submitted fairly and decided fairly. But FEI has nothing, in my view, to say on appeal.

The rulings I am making right now are rulings by the Court, and maybe you can go up and say that the Court erred in the rulings I have made. And they involve a substantial amount of money. What I feel about your appeal doesn't make any

difference. But what I would like to say is that I think you ought to be realistic and realize that what I have said here, unless you have something really very clear in the record that carves certain things out of the trial, you haven't got anything you can say on appeal. So what has happened is that you have come out of a jury trial with a verdict which is so small that you should be saying prayers of thanks, and you have these tag-in things that you are trying to bring up. They are really not worth very much. Your client somehow is going to end up owing O & Y six figures, and if there was ever a reversal on appeal, maybe seven figures.

So if your client could cooperate with O & Y in arriving at some basis for settlement, and if the fact is that your client is in financial difficulty, that is what Mr. Seltzer is willing to talk about with you.

MR. O'CALLAGHAN: Your Honor, I did not say I --

THE COURT: He is willing to talk about it.

MR. O'CALLAGHAN: I did not say --

THE COURT: He didn't have to talk about it. He could sit there and say we are going to go after him, we don't care. But he is sensible in saying maybe our judgment for $700,000 is not going to be worth all this, and O & Y is not in the greatest condition and we don't want to spend their money foolishly. You should not be saying, we won't go into that at this point.

MR. O'CALLAGHAN: I did not say that at this point.

THE COURT: You should be jumping --

MR. O'CALLAGHAN: It was the formality.

THE COURT: Yes, you did say it.

MR. O'CALLAGHAN: It was the formality of discovery. He talked about taking depositions. That is the impression I had, and that is what I objected to. If he would like to have a discussion with me or the principals, that is something else.

THE COURT: All I want is facts, and the way you get facts is to have some honest, sensible, economic way of getting facts, and you should help him get them.

If FEI has enormous assets and is capable of paying a judgment of $500,000 or $8 million, then that would be, of course, something that O & Y would want to consider in determining whether they would want to pursue their judgment or even go to the Court of Appeals and try to get a reversal so that they could claim eight, ten, or twelve or more millions from FEI. If FEI couldn't satisfy a judgment like that, maybe they won't feel it is worth it.

We have done all we can. If you could, both of you, be in touch with me when you are ready for a little further discussion, I think it is worth it. Thanks a lot.

APPENDIX B - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 15, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 15th day of September, one thousand nine hundred and ninety-four.

Present:

Honorable Ralph K. Winter,
Honorable Joseph M. McLaughlin,
Circuit Judges.[22]

OLYMPIA & YORK BATTERY PARK COMPANY, also known as WFC Tower A Company; O & Y (U.S.) DEVELOPMENT CORP., as successor to O & Y Tower C Corp.; OLYMPIA & YORK TOWER B COMPANY; OLYMPIA & YORK TOWER D COMPANY,

Plaintiffs-Appellees,

v.

INSURANCE COMPANY OF NORTH AMERICA, PHILADELPHIA,

Defendant-Third-Party-Plaintiff,

v.

FEI LTD.; JOHN J. FOGARTY; JEAN FOGARTY,

Third-Party-Defendants-Appellants.

---

[22]Judge Timbers recused himself from the panel after oral argument. Pursuant to this court's Rule § 0.14, the appeal has been heard and decided by the remaining two judges of the panel.

ORDER
93-7547

SEAL: UNITED STATES COURT OF APPEALS
FILED
SEP 15 1994
GEORGE LANGE III, CLERK
SECOND CIRCUIT

Appeal from the United States District Court for the Southern District of New york.

This cause came on to be heard on the transcript of record and was argued.

ON CONSIDERATION WHREREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Third-party-defendants-appellants FEI Ltd., John J. Fogarty, and Jean Fogarty appeal from Chief Judge Griesa's dismissal of their third party claims against Olympia & York Battery Park Company, et al., which is embodied in a December 23, 1992 conference direction and a May 4, 1993 dismissal order and Fed. R. Civ. P. 54(b) certification. We affirm for substantially the reasons stated in the district court's conference direction of December 23, 1992. *Olympia & York v. Insurance Co. of North America*, No. 85 Civ. 1238 (S.D.N.Y. Dec. 23, 1992).

S/Signature
Hon. Ralph K. Winter, U.S.C.J.

S/Signature (per RKW)
Hon. Joseph M. McLaughlin, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

ISSUED AS MANDATE 10-6-94 **[Erroneously]**

APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING IN BANC DATED NOVEMBER 15, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLYMPIA & YORK BATTERY PARK

v.

INSURANCE CO OF NA

SEAL:
UNITED STATES COURT OF APPEALS
FILED
NOV 15 1994
GEORGE LANGE III, CLERK
SECOND CIRCUIT

DOCKET NO: 93-7547

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by Appellant's FEI LTD., JOHN FOGARTY, and JEAN FOGARTY.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is *DENIED*.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANG III, Clerk
By: S/Signature
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX D - RULE 54(b) JUDGMENT AND ORDER OF CONDITIONAL DISMISSAL DATED MAY 4, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER C CORP.,

Plaintiffs,

-against-

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,

Defendant,

FEI LTD., et al.,

Third-Party Defendants.

85 Civ. 1238 (TPG)

RECEIVED IN CHAMBERS
OF CHIEF JUDGE
THOMAS P. GRIESA

RULE 54 (b) JUDGMENT
AND ORDER OF
CONDITIONAL DISMISSAL

MAY 4, 1993

SEAL:
U.S. DISTRICT COURT
FILED
MAY 5, 1993
S.D. OF N.Y.

UPON plaintiffs' motion for entry of Rule 54 (b) judgment on certain claims and conditional dismissal of all remaining claims, and all the pleadings and proceedings had herein, and upon full consideration;

WHEREAS the Court has found that certain claims of third-party defendants are final and severable and no just cause

exists to delay entry of judgment with respect to them (*see* Rule 54(b) Certification of even date); and

WHEREAS the Court has determined that further litigation of all remaining claims would be futile; it is hereby

ORDERED AND ADJUDGED, pursuant to Fed. R. Civ. P. 54(b), judgment that third-party defendants take nothing shall be entered on their $900,000 claim for overhead and their $1,000,000 tax reimbursement claim, in connection with buildings A and C, because such claims were incorporated in the jury verdict in this action and are therefore not further actionable. Such judgment is final and appealable.

IT IS FURTHER ORDERED that plaintiffs' claims for $600,000 upon the jury's verdict and for approximately $450,000 in connection with a loan to third-party defendants are, upon plaintiffs; consent, hereby dismissed with prejudice, subject to reinstatement if the foregoing judgment is reversed or the claims to which it pertains are remanded as a result of any appeal.

IT IS FURTHER ORDERED that all other remaining claims of third-party defendants are hereby dismissed with prejudice, subject to reinstatement if the foregoing judgment is reversed or the claims to which it pertains are remanded as a result of any appeal.

Dated: May 4, 1993

S/ Thomas P. Griesa
THOMAS P. GRIESA, U.S.D.J.

APPENDIX E - RULE 54(b) CERTIFICATION, DATED MAY 4, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER C CORP.,
Plaintiffs,

-against-

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,

-against-

FEI LTD., et al.,
Third-Party Defendants.

85 Civ. 1238 (TPG)

RULE 54(b) CERTIFICATION

UPON all the pleadings and proceedings had herein and upon full consideration, the Court finds the following facts in support of its entry of judgment, pursuant to Fed. R. Civ. P. 54(b), on certain of third-party defendants' claims.

1. The majority of the claims in this action were tried to a jury in March 1988.

2. The Court ruled on December 23, 1992 that the third-party defendants' claims for overhead ($900,000) and tax reimbursement ($1,000,000) were considered by the jury and incorporated into its verdict and are thus not further actionable.

3. The Court's ruling is final.

4. Such claims are severable from any and all other outstanding claims in this action.

5. There is no just cause, pursuant to Rule 54(b), to delay entry of judgment on such claims.

Dated: 5-4-93

S/_____
THOMAS P. GRIESA, U.S.D.J.

APPENDIX F - MARCH, 1988, TRIAL
FEI EXHIBIT 317,
"RECAP OF PAYMENTS,"
ANNEXED TO NOVEMBER, 1985,
FEI THIRD-PARTY COMPLAINT,
IN EVIDENCE AT MARCH, 1988, TRIAL
(F. GUILFOYLE AND
J. FOGARTY TESTIMONY,
***See App P*, MARCH, 1988,**
TRIAL TRANSCRIPT, at 63a,
and *Apps R* at 76a and *S* at 110a)

FEI LTD
Hastings-on Hudson, NY., U.S.A.
Athy - Ireland

RECAP OF PAYMENTS FROM O&Y TO FEI
RE BLDGS. A & C as of

	"C"	"A"	
CONTRACT	5,608,813.00	5,060,842.00	10,669,655.00
EXTRAS: OTHER	2,097,390.44	1,722,686.26	3,820,076.70
EXTRAS: MARBLE	1,004,238.82	691,751.83	1,695,990.65
DEDUCTS: OTHER	(292,577.19)	(141,696.65)	(434,273.84)
DEDUCTS: MARBLE	(240,601.00)	(580,168.00)	(820,769.00)
ADJUSTED CONTRACT	8,177,264.07	6,753,415.44	14,930,679.51

BILLED FOR:			
CONTRACT	5,484,736.85	4,952,180.92	10,436,917.77
EXTRAS: OTHER	1,825,376.94	1,565,794.38	3,391,171.32
EXTRAS: MARBLE	1,004,238.82	691,751.83	1,695,990.65
DEDUCTS: OTHER	(292,577.19)	(141,696.65)	(434,273.84)
DEDUCTS: MARBLE	(240,601.00)	(580,168.00)	(820,769.00)
TOTAL BILLED PER REQUISITIONS:	7,781,174.42	6,487,862.48	14,269,036.90

PAYMENTS PER REQUISITIONS:	12,529,383.59	
" ON ACCT. TO FEI:	6,191,116.39	
" " " OTHERS:	201,105.60	FEI BILLS
" " " OTHERS:	115,910.20	O&Y BILLS FOR FEI ACCT.
TOTAL PAYMENT TOWARD FEI'S "A/C" ACCOUNT	19,037,515.78	

BILLING/CLAIMS SUBMITTED:		
REQUISITIONS: "A"	6,487,862.48	
"C"	7,781,174.42	
CLAIMS:		
4-15 MARBLE	438,929.33	
7-22 PRIORITY CHANGE	1,441,687.00	
8-05 EXCESS WAGE	4,068,168.00	
10-23 STONE REPAIRS	898,073.25	
TOTAL BILLING/CLAIMS		21,115,894.48
LESS PAYMENTS		(19,037,515.78)
STILL DUE FEI		$2,078,378.70

APPENDIX G - MARCH, 1988, TRIAL
FEI EXHIBIT 318 FOR IDENTIFICATION
[COVER PAGE 318A "IN EVIDENCE",
ANNEXED DOCUMENTATION, (40 PAGES),
***NOT* IN EVIDENCE]**

FEI LTD.
Athy Industrial Park
Athy, Ireland

5th July, 1985

Olympia and York Battery Park Company,
245 Park Avenue, 25th Floor,
New York, 10167

AMOUNTS OWING TO FEI LIMITED AT 30/06/1985

Total amounts due per attached documentation	9,551,599.70
Cash already advanced in recognition of cost overruns	(5,327,338.25)
TOTAL NOW DUE	4,224,261.45

S/D. O'Reilly
D. O'Reilly
Financial Controller

DX 318A ~~ID~~
(JUST COVER PAGE)

APPENDIX H - MARCH, 1988 TRIAL
O&Y EXHIBIT 15, IN EVIDENCE
"O&Y LOSSES"

	BLDG A	BLDG C	TOTAL
O&Y COST FOR WORK IN F.E.I. CONTRACTS:			
AMOUNT PAID TO FEI PER CONTRACT	$5,626,258	$6,894,262	$12,520,520
AMOUNT PAID TO FEI ABOVE CONTRACT	3,055,825	3,888,105	6,943,930
AMOUNTS PAID OR DUE TO OTHERS	3,630,381	3,460,050	7,090,431
UNREPAID LOAN TO FEI	--	--	473,250
TOTAL PAID BY O&Y	$12,312,464	$14,242,417	$27,028,131
ADJUSTED CONTRACT PRICE	-6,097,532	-8,012,213	-14,109,745
O&Y LOSSES	**$6,214,932**	**$6,230,204**	**$12,918,386**

APPENDIX I - MARCH 1988 TRIAL INTERROGATORIES FOR JURY

OLYMPIA & YORK v. INA v. FEI

Interrogatories for Jury

1. Do you find by a preponderance of the evidence that FEI became financially unable to proceed with the contract?

Yes X

No _____

2. O & Y contends that it substantially performed its obligations with respect to granite supply and that accordingly there was no failure of performance by O & Y causing FEI's financial inability. FEI contends that O & Y failed to substantially perform its obligations with respect to granite supply and that such failure of performance by O & Y caused FEI's financial inability. O & Y has the burden of proof to sustain its contentions by a preponderance of the evidence.

a) Do you find by a preponderance of the evidence that O & Y substantially performed its obligations with respect to granite supply?

Yes _____

No X

b) If your answer to part (a) is No, do you find that O & Y has shown by a preponderance of the evidence that this failure did not cause FEI's financial inability?

Yes X

No _____

If your answer to Question 1 is Yes, and if your answer to

either Question 2(a) or Question 2(b) is Yes, proceed to Question 3. Otherwise proceed to Question 4.

3. What is the amount of expenses above the adjusted contract price, if any, that you find by a preponderance of the evidence O & Y reasonably incurred to complete or repair FEI's work under the contract?

$ 600,000

4. Do you find by a preponderance of the evidence that the change in priority constituted a material alteration of the contract?

Yes _____

No _____

APPENDIX J - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 19, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK,
Plaintiff,

-against-

INSURANCE COMPANY OF NORTH AMERICA,
Defendant,

-against-

F.E.I., INC.,
Third-Party Defendant.

85 Civ. 1238 (TPG)

OPINION

Since the conclusion of the trial in this action on March 30, 1988 various motions have been made. A hearing on the motions was held on June 17, 1988, at which time certain rulings were made, to be followed by an opinion.

I.

O & Y has moved for judgment notwithstanding the verdict, or in the alternative, for a new trial, with respect to the jury's answer to Interrogatory 3. The court denied this motion on June 17, 1988. The following constitutes a further explanation of what was stated at that time. The interrogatory and the answer are as follows:

3. What is the amount of expenses above the adjusted contract price, if any, that you find by a preponderance of the evidence O & Y reasonably incurred to complete or repair FEI's work under the contract?

$600,000

According to O & Y, the undisputed evidence at trial revealed that the adjusted contract price was $14,109,745 and that O & Y incurred reasonable expenses above this figure in the amount of $12,918,386 - the total payments by O & Y being $27,028,131.

O & Y argues that the $12.9 million excess can be divided into two categories - amounts paid before FEI was terminated in April 1986 and amounts paid post-termination. O & Y contends that the evidence is unrebutted that it incurred expenses totalling $7,812,407 above the adjusted contract price prior to termination, total pre-termination payments being about $22 million. According to O & Y, the $7,812,407 consisted of $6,943,930 paid directly to FEI, $517,574.21 paid to FEI's suppliers, and $350,903 for workmen's compensation premium payments for FEI.

With regard to post-termination expenses, O & Y argues that the evidence shows that these amounted to $4,632,729.

In addition to the above items, O & Y contends that it is undisputed that FEI owes an additional $473,250, representing the unpaid balance on a loan.

O & Y contends that there was no basis upon which the jury could fail to include the $7,812,407 pre-termination expenses in the amount found in answer to Interrogatory 3. O & Y further contends that the $473,250 loan balance should have been included. O & Y seeks judgment n.o.v. for $7,812,407 against INA and $473,250 against FEI. With regard to the $600,000 found by the jury, O & Y apparently recognizes the obvious fact that this amount was awarded with respect to the post-termination expenses. In other words, it is clear that the jury awarded nothing for the pre-termination expenses, and did not make an award with respect to the loan.

As to the post-termination expenses, O & Y recognizes that there was a legitimate question for the jury as to the amount of the

reasonable expenses incurred and is not seeking judgment n.o.v. with respect to this issue. However, O & Y contends that the jury's verdict was against the weight of the evidence and that a new trial should be held on this issue. Moreover, O & Y contends that if judgment n.o.v. is not granted with respect to the pre-termination expenses and the loan, a new trial should be held on the entire issue of damages.

In dealing with a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the party supporting the verdict. The motion will be granted only if there is a complete absence of prohibitive evidence to support the verdict or the evidence is so strongly and overwhelmingly in favor of the moving party that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against him. *Noonan v. Midland Capital Corp.*, 453 F.2d 459, 461 (2d Cir. 1972). If there is a view of the case which reasonable jurors could take and which supports the verdict, a judgment n.o.v. will not be granted. *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108, 119 (1963).

The standard for granting a new trial is somewhat less demanding. A new trial can be granted where the judge determines that the verdict is contrary to the weight of the evidence. However, the judge must abstain from interferring [sic] with the verdict unless it is clear that the jury has reached a seriously erroneous result. *Bevevino v. M. S. Saydiari*, 574 F.2d 676, 684 (2d Cir. 1978).

For purposes of this motion, the court will assume that O & Y made payments to FEI, and to third parties on behalf of FEI, totalling about $27 million. However, in order to answer Interrogatory 3 the jury needed to find what portion of these expenses were *reasonably incurred*, and also needed to find the amount by which the reasonably incurred expenses exceeded the *adjusted contract price*.

The issue on this motion breaks down into two questions:

(1) Was the jury bound to accept the figure of $14,109,745 as the adjusted contract price?

(2) Was the jury bound to accept the proposition that the full $27 million spent by O & Y was *reasonable*?

In the view of the court, both questions must be answered in the negative.

By the fall of 1984 the contract price, with adjustments agreed upon at that time, was $14,109,745. The amount which had been paid to FEI at this time was $12 million. The balance had been retained by O & Y as is customary in construction projects.

Numerous problems had been experienced by the parties dating back almost to the inception of the project, but the fall of 1984 presented an acute crisis. According to the testimony of Jack Fogarty, Sr., which the jury was entitled to accept, O & Y was making extreme demands on FEI in order to make the progress which O & Y desired. In order to comply with these demands, FEI's level of expenses was increasing due to a greatly expanded work force, additional equipment, etc. In connection with these problems, Fogarty had discussions with a representative of O & Y by the name of Otto Blau. Fogarty's testimony regarding his discussions with Blau was essentially uncontradicted since Blau was not called as a witness by O & Y, although he attended parts of the trial.

According to Fogarty's testimony, Fogarty indicated to Blau in the fall of 1984 that FEI could not afford to continue the work at the level of expense required to meet O & Y's demands, and in discussions at this time and thereafter, Blau sought to have FEI continue, repeatedly assuring Fogarty, "You won't be hurt." According to Fogarty, in order to have FEI stay on the job, O & Y agreed to make substantial payments to FEI, and also to make payments to FEI's suppliers on behalf of FEI, over and above the $12 million already paid to FEI and over and above the then existing $14.1 million adjusted contract price. As already indicated, by the time FEI was terminated in April 1986 the total amount of all payments to and on behalf of FEI was about $22 million, or about $7.8 million more than the $14.1 million figure.

FEI and INA argue that the jury found, and found properly, that the $7.8 million involved a further adjustment to the contract price, making the total adjusted contract price $22 million.

O & Y contends, on the other hand, that the jury was not justified in using any figure for the adjusted contract price except the $14.1 million. O & Y argues that what occurred in the fall of 1984 was that FEI defaulted because it was financially unable to

complete its work for the adjusted contract price of $14.1 million, and that the payments to and on behalf of FEI thereafter prior to the termination of FEI - $7.8 million - should not be considered as made pursuant to any agreement with FEI involving further adjustments to the contract price. O & Y notified INA in the fall of 1984 of what it claimed was a default by FEI. O & Y argues that INA is liable on its bonds for all payments made to and on behalf of FEI thereafter.

It should be added that any liability of INA would be passed on to FEI under an indemnity agreement. Also, although O & Y originally sued INA only, the pleadings now contain a direct claim by O & Y against FEI.

It is now appropriate to consider the meaning of the jury's several interrogatory answers with respect to the positions of the parties. It should be noted that the court originally proposed a different format for jury interrogatories than what was ultimately used. The court would have basically asked the jury to find whether FEI defaulted, whether the default caused O & Y loss, and if so, how much. All parties objected to this approach, and proposed more particularized interrogatories. In retrospect, the latter format may have been less than ideal. However, it was in accordance with the wishes of the parties, and it is now clear that the jury used these interrogatories to reach a just result.

The first interrogatory asked whether the jury found that "FEI became financially unable to proceed with the contract." The jury answered in the affirmative. It was understood that FEI's financial inability to proceed amounted to a default under the contract, unless that financial inability was caused by FEI [sic]. In connection with this causation point, only one issue was presented to the jury, and that was whether O & Y failed in its obligations as granite supplier and whether this circumstance caused FEI's financial inability. The jury found, in answer to Interrogatory 2, that O & Y did not substantially perform its obligations as to the granite supply, but that this failure did not cause FEI's financial inability. Because of the burden of proof rules adopted by the court, the actual questions to the jury were of a slightly different tenor, but this is the essence of the what the jury found.

The net affect [sic] of the jury's answers to Interrogatories 1 and 2 was that FEI had defaulted on its contractural [sic]

obligations. It had become financially unable to proceed with the contract, and this financial inability was not excused - at least it was not excused by O & Y's failure with respect to the granite supply. It is important to note that the jury was not asked to specify the time when FEI became financially unable. None of the parties suggested such a question.

This brings us to Interrogatory 3, which asked the jury to find the amount of expenses above the adjusted contract price which O & Y reasonably incurred to complete or repair FEI's work under the contract. The jury answered that this amount was $600,000.

It is quite easy to discern how the jury arrived at this figure of $600,000. They clearly accepted the testimony of Fogarty, as described above, to the effect that commencing at least in the fall of 1984, FEI was incurring expenses of great and unforeseen magnitude, that FEI made it plain to O & Y that FEI could not afford such expenses, that O & Y caused FEI to continue the work and to do so at the high expense level by providing large additional payments to FEI and to third parties on behalf of FEI.

What the jury undoubtedly found was that the entire amount of payments by O & Y between the fall of 1984 and the April 1986 termination - about $7.8 million - were payments which O & Y agreed to make to FEI, and that they constituted part of the "adjusted contract price" referred to in Interrogatory 3. Thus, it is clear that the jury found that the adjusted contract price was not $14.1 million, but $14.1 million plus about $7.8 million, or about $22 million.

By the same token, the jury clearly rejected O & Y's argument that the adjusted contract price was no more than the $14.1 million, which had been agreed upon as of the fall of 1984. The jury undoubtedly rejected the idea (which is inevitably involved in O & Y's position) that FEI continued to work for about a year and a half following the fall of 1984 and received $7.8 million in payments subject to having to refund them. The jury clearly concluded that this concept would be at sharp odds with Blau's assurances that FEI would not be hurt. The jury was advised in plain terms that, although the main claim of O & Y was against INA on the performance bonds, any recovery against INA would be indemnified by FEI. Thus the jury knew that the ultimate burden would fall on FEI, whether through INA's third-

party claim against FEI or through O & Y's direct claim, pleaded following the filing of the original complaint.

The decision reached by the jury was in accord with the weight of the evidence. The jury was fully justified in concluding that the adjusted contract price included the $7.8 million paid to and on behalf of FEI between the fall of 1984 and the termination in April 1986.

This brings us to a consideration of that termination and what occurred thereafter. It was O & Y who terminated FEI. However, O & Y contended that the April 1986 termination was part of a chain of events resulting from the financial inability of FEI to complete its contract. The jury could properly find that O & Y agreed to support FEI financially for a time, but was not obliged to do so indefinitely, and was warranted in terminating FEI when it did in April 1986. What remained was to determine what expenses O & Y reasonably incurred to finish FEI's work following this termination.

O & Y claims that it spent approximately $4.6 million after the termination of FEI to complete work which should have been done by FEI. However, the jury determined, in answering Interrogatory 3, that the expenses *reasonably incurred* were $600,000. O & Y contends that this finding is contrary to the weight of the evidence and that there should be a new trial on this point.

In the court's view, it cannot be said that the jury's determination was so seriously in error as to justify a new trial. It was well within the jury's province to make the decision which it did.

There was ample evidence to indicate that, at the time of FEI's termination, the two buildings involved in this case were very close to completion and that only a small amount of work remained to be done. Both testimony and documents supported this view. At the time of FEI's termination, O & Y prepared a summary of the work remaining to be carried out on each building - known as Building A and Building C. Both summaries indicated that the amount of uncompleted work was very small indeed in relation to the size of the project which FEI had contracted to perform. Jack Fogarty, Sr. testified that, in his judgment, the O & Y summaries accurately described what remained to be done in the two buildings. He estimated that the amount required to

perform the described work on Building A was $200,000-$250,000, and on Building C $350,000. Fogarty also gave his opinion about a proposal provided by another possible contractor, McNulty, in April 1986 as to completing the work on Building C. This proposal did not give a cost estimate, but gave an estimate of the amount of labor required - four to five months for two three-man teams. Fogarty assumed a 5-month period for the proposed McNulty work, or 20 weeks, and gave his opinion that the cost of employing the six men for 20 weeks would be an average per man of $1,000 per week, or a total of $6,000 per week, or a grand total for labor of $120,000. Fogarty estimated that, with materials, overhead and profit, this work would come to approximately $300,000.

In answering Interrogatory 3, the jury obviously accepted Fogarty's testimony and found an amount ($600,000) within the range of the figures testified to by Fogarty.

O & Y strongly objects to the jury's reliance upon Fogarty's estimates instead of the evidence that O & Y actually spent $4.6 million. But the jury could reasonably have serious questions as to how the very minor amount of work described in O & Y's own summaries could cost $4.6 million, a sum equal to about 40% of the original contract price. Moreover, the jury had been presented with a great volume of evidence, both testimony and documents, to the effect that O & Y's conduct had made the granite cladding job vastly more expensive than it should have been. Viewing the evidence as a whole, the jury was justified in finding that FEI was responsible for $600,000 and not $4.6 million.

To summarize the court's findings regarding Interrogatory 3, it is apparent that the jury believed that the entire amount paid to FEI prior to the termination represented the adjusted contract price, that the only amount expended by FEI over and above the adjusted contract price was what it spent post-termination, and, finally, that the reasonable cost of the post-termination work was $600,000. This view of the evidence was entirely reasonable.

With regard to the unrepaid loan of $473,250, this issue was not submitted to the jury during the trial. The post-trial motions do not deal with the loan in a satisfactory manner. The loan will be covered in the further proceedings in this case.

II.

FEI has also moved for judgment n.o.v. or a new trial. One ground for this motion is the contention which FEI made at the trial, and which was rejected at that time by the court, that O & Y's obligation to supply granite in proper quantity, sequence and quality was a condition precedent to any obligation on the part of FEI. FEI argued at the trial that O & Y failed to meet this obligation and that this failure totally destroyed any claim by O & Y of a default on the part of FEI. FEI sought to have the jury interrogatories framed in accordance with this contention. The court refused this request, ruling that under no view of the evidence could it be found that O & Y had failed to fulfill a condition precedent which relieved FEI of all responsibility. The court adheres to this view and denies this branch of FEI's motion.

The other ground for FEI's motion is the claim that O & Y retained approximately $1.6 million and that FEI is entitled to judgment against O & Y for this retention.

This claim, even if valid, would not be appropriate for a judgment n.o.v. or a new trial before a jury. It does not contradict any of the jury answers to the interrogatories. Perhaps there should have been an interrogatory on this point. However, we need not dwell at length on the procedural difficulties. The claim is wholly invalid on its merits. Even if O & Y retained the $1.5 million at some point, O & Y has more than made up this deficiency by the $7.8 million payments it made to and on behalf of FEI beginning in the fall of 1984, which have been described previously.

There is no basis for a judgment n.o.v. or a new trial on these points.

In its post-trial motions, FEI attempts to raise again certain arguments about discovery abuses by O & Y committed prior to the trial. The court dealt with the discovery problems in various pre-trial rulings, and no further rulings are necessary.

Finally, FEI appears to suggest that its pleading be amended to conform to the trial evidence. The nature and basis for the request is not at all clear. There is no demonstration of any need for such an amendment, and the application is denied.

III.

Before describing INA's post-trial applications, some background should be set forth.

It is familiar law that where a surety issues a performance bond regarding a particular contract, the surety is discharged from liability on the bond if the parties to the contract materially alter that contract without the surety's consent. In other words, the bond covers the contract referred to, not some other and different contract. *U.S. v. Freel*, 186 U.S. 309, 316 (1902); *Reliance Insurance Co. of Philadelphia v. Colbert*, 365 F.2d 530, 534 (D.C. Cir. 1966).

INA contended at the trial that the contracts covered by its two bonds were materially altered and that INA was thus discharged from liability. INA asserted several alleged material alterations. It was agreed that the court would decide these issues except for one claim of material alteration which would be submitted to the jury. This was the claim that the change in priority of construction of the buildings constituted a material alteration. Interrogatory 4 asked the jury whether they found that the change in priority constituted a material alteration. The jury answered in the negative.

Immediately after the trial INA made a motion for judgment n.o.v. with respect to Interrogatory 4. The court denied the motion. INA has now moved for reconsideration. This motion is denied. For reasons which already appear on the record, the jury was justified in finding against INA in connection with Interrogatory 4.

INA has presented the following additional grounds for its claim of material change, and these contentions are to be decided by the court without a jury:

a) O & Y's failure to properly supply granite to FEI.

b) Changes in the architectural drawings.

c) The sale of one building to American Express with the result of adding another layer of direction and control over FEI's performance.

d) Extensions in the amount of time FEI was supposed to complete the work.

e) Increases in the formally agreed adjusted contract price which were never agreed to by INA.

f) Payments to FEI which were not consented to by INA and which were above the amount O & Y considered to be the adjusted contract price.

The court would benefit from further discussion with counsel on the question of whether Items (a) - (f) should result in discharging INA from all liability. These unresolved items will be included in further proceedings regarding still other issues in the case which need to be resolved before the case is finally concluded.

Dated: New York, New York
September 19, 1988

S/ Thomas P Griesa
THOMAS P. GRIESA
U.S.D.J.

APPENDIX K - EXCERPTS FROM FEI FRCP RULE 16 AFFIDAVIT SWORN TO NOVEMBER 30, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK BATTERY PARK COMPANY and O&Y TOWER C CORP.,
Plaintiffs,

-against-

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,

-against-

FEI, LTD. ET AL.,
Third-Party Defendants.

85 Civ. 1238 (TPG)

F.R.C.P. Rule 16
AFFIDAVIT

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

I, John J. Fogarty, being duly sworn, depose and say:

1. As a Director of FEI, LTD. and as a Third Party Defendant in this action, I submit this Affidavit in support of the Court's conference direction to provide grounds for FEI's claims and/or counter-claims against O&Y.

2. To make the record clear, to the extent practicable, I adopt as my own sworn statement the representations made in the

November 4, 1988 Affirmation of FEI's counsel similarly submitted pursuant to Court direction.

* * *

8. To the extent not earlier identified in FEI's summary of claims (EXH. E), FEI increases its claim concerning Buildings "D/B Gatehouse" in the amount of IR£ 312,515 as identified in FEI's July 2, 1985, letter, attached as p.5 to Exh. F-3.

* * *

[LETTER FROM FEI LTD TO O&Y
DATED JULY 2, 1985]

FEI LTD
Athy Industrial Park
Athy, Ireland
[telephone/Telex numbers omitted]

2nd July, 1985

Olympia and York Battery Park Company,
245 Park Avenue, 25th Floor,
New York, 10167.

INVOICE/CHANGE ORDER -
BUILDINGS "D"/"B" GATEHOUSE

PRODUCTION TIME OVERRUN

The insistence on adhering to a production schedule in floor increments by O&Y - outside any contract arrangements - prevented long production runs, in particular panel types. This led to production being of a stop/go nature and extended the life of the jobs for 8 weeks.

The cost to FEI of this unwarranted extension by 8 weeks is as follows: -

Wages		
Athy Plant	@ IR£ 15,500 per week =	124,000
Overheads		
calculated	@ IR£ 2.15 per sq. ft. =	110,043
Profit		
contribution	@ IR£ 1.50 per sq. ft. =	77,472
		IR£ 312,515

Total due IR £ 312,515
@ 1.015 U.S.Dollars = $307,896.55

D. O'Reilly
Financial Controller

APPENDIX L - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 2, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER CORP.,
Plaintiffs,

-against-

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA,
Defendant,

- against -

FEI LTD., et al.,
Third-Party Defendants.

OPINION

85 Civ. 1238 (TPG)

Two matters are presently before the court for decision. The first is O & Y's motion to reargue the ruling contained in the court's opinion of September 19, 1988. The second is the question of whether INA is relieved of its surety bond obligations because of alterations in the contract[23] between O & Y and FEI.

I.

---

[23]There were actually two contracts and two surety bonds. However, they are closely related and have been referred to in the litigation in the singular - as one contract and one bond.

On September 19, 1988 the court handed down an opinion dealing with various post-trial motions. Among other things, the court denied O & Y's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, with respect to the jury's answer to Interrogatory 3. O & Y has now moved for reargument. O & Y argues that no issue or evidence was presented to the jury which could in any way allow it to find that the adjusted contract price was $22 million. O & Y contends that the adjusted contract price was conclusively established as being $14.1 million and that indeed the court so instructed the jury. O & Y further argues that, in any event, the alleged adjustments of the contract price up to $22 million could have no effect because they were not in writing as required by the contract. O & Y refers to a related New York statute. N.Y. General Obligations Law § 15-301(1).

In their response to the motion for reargument, FEI and INA have provided exhaustive citations to the trial record, which demonstrate the lack of merit in the O & Y contentions.

Although the questions to the jury were drawn in a somewhat narrow and specific manner, the court's instructions to the jury explained the nature of the basic problem. The essential issue was whether FEI had defaulted in performing under the contract and whether O & Y had sustained loss or damage by reason of such default. It was further explained to the jury that O & Y was not making its case in regard to default by way of contentions about specific construction defects, delays, etc. O & Y had pitched its case solely on the contention that FEI's default consisted of becoming financially unable to perform its obligations under the contract. The jury was then told that there were further issues about whether *O & Y* had failed to perform its obligation with regard to supplying granite to be used by FEI and whether such failure was the cause of FEI's financial inability, if such inability were found. Finally, the jury was asked to find, if the answers to the above questions made it appropriate, the amount of expenses above the adjusted contract price which 0 Y & reasonably incurred to complete or repair FEI's work under the contract. In the instruction regarding this issue, the court referred to O & Y's Exhibit 15, in which O & Y listed its contentions regarding payments over and above the adjusted contract price. In that exhibit, O & Y presented the figure of $14.1 million as being the

adjusted contract price and presented other figures indicating that $12.9 million had been spent over and above that adjusted contact price. However, the court did not in any sense instruct the jury that it should accept any figure from that exhibit and told the jury that they should determine whether the figures were accurate.

The jury returned an affirmative answer to Interrogatory 1, thus finding that FEI did become financially unable to proceed with the contract. In its answers to Interrogatory 2a and 2b, the jury found that O & Y had failed to perform its obligations regarding the furnishing of granite but that this failure was not the cause of FEI's financial inability to proceed with the contract.

Interrogatory 3 asked:

> 3.What is the amount of expenses above the adjusted contract price, if any, that you find by a preponderance of the evidence O & Y reasonably incurred to complete or repair FEI's work under the contract?

This interrogatory required the jury in effect to find the damage or loss to O & Y attributable to the default of FEI (the financial inability of FEI to proceed with the contract). The jury found that this amount was $600,000.

As described in the September 19, 1988 opinion, it is perfectly clear that this $600,000 related to the time following O & Y's termination of FEI in April 1986. However, O & Y contends that it was conclusively proved that the default of FEI through financial inability occurred in the fall of 1984, and that the jury was entitled to consider no other date as the time of the default. O & Y further argues that all the "extra" expenses incurred after that time were damages due to the default. Finally, O & Y argues that it was conclusively proved that the adjusted contract price was $14.1 million, which was the amount of the original contract, with formalized adjustments, as of the fall of 1984. O & Y argues that there was no basis for the jury to believe that there were any further adjustments to the contract price, and that the evidence mandates a finding that the amounts paid to or on behalf of FEI above the $14,1 million are damages due to default.

All these contentions of O & Y ignore certain prominent uncontradicted testimony presented by FEI, testimony which the jury asked to have repeated to them in the final stages of their deliberation. This testimony was that, beginning in the fall of 1984, O & Y was demanding an increased level of performance by FEI - consisting of a greatly increased commitment of labor and equipment - which raised FEI's cost levels far beyond what had been contemplated. FEI asserted that it could not possibly afford what it termed these unreasonable requests. Nevertheless, O & Y executives virtually begged FEI to stay on the job and to perform at the increased level of production. O & Y assured FEI that it would not be hurt and that it would be made whole, and followed up these assurances with $7,8 million additional payments, over and above the $14.1 million formally adjusted contract price.

A fair reading of the record shows that the jury was presented with the issue of whether these additional payments constituted further adjustments to the contract price. Moreover, there was ample evidence to support a finding that all payments made prior to FEI's termination in April 1986 were such agreed upon adjustments.

There is another important consideration justifying the jury's verdict. The jury found, in its answer to Interrogatory 2a, that O & Y had not fulfilled its obligations with regard to the granite supply. Although the jury then found that this failure on the part of O & Y was not responsible for FEI's financial inability (as found in its answer to Interrogatory 1), nevertheless the jury's finding regarding the granite supply was not without significance. The record is replete with evidence, including O & Y's internal documents, indicating the gravity of the difficulties created by O & Y with regard to the granite supply, and with regard to other matters for which O & Y, not FEI, was responsible. The jury was justified in concluding that much of the additional expense, over and above the formal adjusted price of $14.1 million, was due to O & Y's own mismanagement regarding the granite supply and other circumstances which were caused by O & Y and which should not be charged to FEI.

It should be noted that the jury was not required to find, either by the court's instruction or by anything conclusively proved in the evidence, that the default by way of FEI's financial inability occurred in the fall of 1984. Under the evidence, the jury could

well have found that FEI's financial problems in the fall of 1984 related to its difficulty in meeting O & Y's *increased demands*, rather than requirements under the original contract, and that what occurred was an alteration and adjustment of the contract rather than a default by FEI. Of course, the jury found that at some point there was a default by FEI resulting in damages to O & Y of $600,000. The jury was not asked to specify the time of the default, and no party to this action can now complain about the lack of such a specification. It can simply be said that the jury would have been justified in finding the date of default as being the time of the termination in April 1986 or some time thereabouts.

It is worth noting that the questions presented to the jury were unusually complex. As one ponders the result reached by the jury, the soundness and good sense of their decision becomes more and more apparent. With regard to the issue of damages, it is well to keep firmly in mind that the default relied upon by O & Y was the occurrence of financial inability on the part of FEI. The jury obviously had the discernment to see that this kind of default could hardly operate to magnify this project from one in the range of $10-14 million to a $22 million or a $27 million project. Those enormously increased costs must have been due to factors other than FEI's financial inability, and the jury so found.

As a final matter, it is necessary to deal with O & Y's argument based upon the provision of the contract with FEI requiring changes to be in writing, and the statute providing that, where there is such a contractual requirement, the contract cannot be changed by "an executory agreement unless such executory agreement is in writing." N.Y. General Obligations Law § 15-301(1). O & Y fails to cite the New York cases which state that such a contractual requirement and the New York statute are not an absolute bar to oral modifications of a contract, and that a party may be estopped by his conduct and words from insisting upon a writing. *Rose v. Spa Realty Associates*, 42 N.Y.2d 338 (1977); *American Bag & Metal Co. v. Alcan Aluminum Corp.*, 115 A.D.2d 958, 959 (4th Dept. 1985). A stronger case of estoppel could hardly be imagined than that presented by the uncontradicted evidence at the trial here. O & Y urged FEI to go forward with its work, at an increased commitment of resources, for over a year. O & Y received the benefit of FEI's services and paid for them. O & Y is estopped from claiming that the adjustments to

the contract are invalid because of lack of a writing.

II.

It is now necessary to deal with the contention of INA that the construction contract it bonded was materially altered, thus discharging INA from liability.

The established rule and the relevant cases are set forth in the opinion of September 19, 1988. A surety is discharged from liability on the bond if the parties to the contract covered by the bond materially alter that contract without the surety's consent.

INA has asserted several claims of material alteration. It was agreed that the court would decide these, except for one which was submitted to the jury. This was the claim that the change in priority of construction of the buildings constituted a material alteration. The schedule incorporated into the contract provided that Building C was to be completed before Building A. As it turned out, Building A was given priority over Building C. The jury was asked whether this change of priority constituted a material alteration, and answered in the negative.

The court now rules in favor of INA on its other claims of material alteration. There was a combination of circumstances which went to make up this material alteration. It should be noted that the change in priority was part of that combination. The jury's verdict, dealing with the priority change in isolation, does not foreclose this ruling by the court.

A most important part of the contract between FEI and O & Y was the obligation of O & Y to furnish FEI granite in proper quantity and sequence. The jury has found, and the court fully agrees with the jury's finding, that O & Y materially breached this obligation. Despite this breach, and despite other difficult circumstances, including the change in priority of the buildings, FEI persevered with the job in response to the urgings of O & Y. However, the nature of FEI's work and the relationship between the parties became sharply altered from what had been contemplated and provided in the contract which was bonded by INA. A vivid indication of this can be found by comparing the original contract price with the amount ultimately paid by O & Y for the granite cladding work. The original contract price was $10.6 million, and the amount bonded by INA was $10.6 million.

By the time FEI was terminated in April 1986 O & Y had paid about $22 million to, or for the benefit of, FEI. Following FEI's termination, O & Y laid out another $5 million on the job, making the total cost $27 million.

Simply put, INA did not bond a $22 million project or a $27 million project. Over a period of time,, the nature and magnitude of the job was drastically changed. It is clear that the contract bonded by INA was materially altered.

At no time did INA consent to such alteration. Although there were communications between O & Y and INA at various times, including claims under the bond and commencement of this lawsuit in early 1985, O & Y continued to pursue its dealings with FEI as already described in this opinion and in the September 19, 1988 opinion. At no time did INA consent to the adjustments which were going on. More important, it is clear that INA had nothing approaching full knowledge of what was occurring. A meaningful development of the facts did not take place until the discovery and trial in this lawsuit, a process which was difficult in the extreme.

CONCLUSION

The court rules once again that the jury's answer to Interrogatory 3 should stand. The court also rules that INA is discharged from liability on its bond because of material alteration of the contract covered by the bond.

The remaining issues to be resolved before a final judgment can be entered will be covered in further proceedings.

SO ORDERED.

Dated: New York, New York
June 2, 1989

THOMAS P. GRIESA
U.S.D.J.

APPENDIX M - FINAL JUDGMENT
AS TO
INSURANCE COMPANY OF NORTH AMERICA
OF THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
DATED SEPTEMBER 24, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLYMPIA & YORK BATTERY PARK COMPANY and O & Y TOWER C CORP.,

Plaintiffs,

-against-

INSURANCE COMPANY OF NORTH AMERICA,
Defendant.

INSURANCE COMPANY OF NORTH AMERICA,
Third-Party Plaintiff,

-against-

F.E.I., Ltd., JOHN J. FOGARTY and JEAN FOGARTY,
Third-Party Defendants.

85 CIVIL 1238 (TPG)

FINAL
JUDGMENT
AS TO DEFENDANT
INSURANCE COMPANY
OF NORTH AMERICA

SEAL:
U.S. DISTRICT COURT
FILED
OCT 1 1991
S.D. OF N.Y.

A Jury Trial before the Honorable THOMAS P. GRIESA, United States District Judge, having begun on February 22, 1988, and at the conclusion of the trial the jury having answered the

attached "Interrogatories for Jury," and the jury in so doing having returned a verdict in favor of Olympia & York in the amount of $600,000.00, for incurred expenses, and the Court having reserved decision on the remaining issues, thereafter plaintiffs' having moved for judgment notwithstanding the verdict and/or a new trial, Defendant Insurance Company of North America having opposed plaintiffs' motion and having cross-moved for (1) a directed verdict , or in the alternative granting reargument to defendant on its oral motion for judgment notwithstanding the verdict made at the conclusion of the trial, and (2) a new trial on all issues if plaintiffs' motion for a new trial was granted, third-party defendant F.E.I., Ltd., having opposed plaintiffs' motion and having cross-moved for judgment notwithstanding the verdict or for a new trial if plaintiffs' motion for a new trial was granted, and the Court thereafter on September 4, 1991, having handed down its order for judgment; directing the Clerk of the Court to enter a final judgment dismissing with prejudice the plaintiffs' complaint in its entirety against defendant Insurance Company of North America, and further ordering that there is no just reason for delay in the entry of such final judgment, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed in its entirety with prejudice as to defendant Insurance Company of North America.

DATED: New York, New York
September 24, 1991

S/ James M Parkison
Clerk

APPROVED:

S/Thomas P. Griesa
U.S.D.J.

APPENDIX N - SELECTED EXHIBITS TO FEI MOTION FOR TRIAL DATED APRIL 9, 1993 (VARIOUS ITEMS OF CORRESPONDENCE)

[LETTER FROM COUNSEL FOR O&Y TO COUNSEL FOR FEI DATED APRIL 23, 1990]

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE
NEW YORK, N.Y. 10022
---
(212) 836-8000

[OTHER ADDRESSES OMITTED]

April 23, 1990

Daniel J. O'Callaghan, Esq.
230 Park Avenue
New York, New York 10169

Re: *O&Y v. INA v. FEI*

Dear Dan:

After John Zuccotti was unable to attend our first scheduled meeting, we have had to defer rescheduling this meeting in order to accommodate Mr. Fogarty, Sr.'s trips to Ireland and your recent court appearance. We have now agreed upon Thursday, May 10, 2 P.M. at 237 Park Avenue, 12th floor. See you then.

Yours truly,

S/_____
Richard C. Seltzer

RCS:rf
cc: Harold H. Wolgel, Esq.

[LETTER FROM COUNSEL FOR FEI
TO COUNSEL FOR O&Y
DATED NOVEMBER 26, 1991]

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
230 PARK AVENUE
NEW YORK, N.Y. 10169

212-370-1000
[TELECOPIER/TELEX NUMBERS OMITTED]

Richard C. Seltzer, Esq.
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, NY 10022

Re: Olympia & York v. INA v. FEI, et al.
85 Civ. 1238 (TPG)

Dear Richard,

Now that O&Y's action against INA has been resolved, FEI again proposes that our meeting of principals resume so that the parties may conclude this case through a settlement rather than through continued litigation. Please telephone at your earliest convenience.

Sincerely,

Daniel J. O'Callaghan

DJOC: wr
cc: FEI

[LETTER FROM COUNSEL FOR FEI TO HON. THOMAS P. GRIESA, UNITED STATES DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 7, 1992]

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
230 PARK AVENUE
NEW YORK, N.Y. 10169
212-370-1000
[TELECOPIER/TELEX NUMBERS OMITTED]

January 7, 1992

Hon. Thomas P. Griesa
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, NY 10007

Re: FEI v. O&Y
85 Civ. 1238 (TPG)

Dear Judge Griesa,

For quite some time, FEI has sought to resolve the remaining items in dispute with O&Y, particularly through meetings at the executive level of FEI and O&Y officers. This effort has been unsuccessful. Moreover, O&Y has not responded to FEI's telephone or written invitations for continuation of these discussions. Thus, FEI requests that at the Court's earliest convenience, a conference be scheduled.

Respectfully,
S/_____
Daniel J. O'Callaghan

DJOC: wr
cc: FEI
Richard C. Seltzer, Esq.